UNION OIL COMPANY OF CALIFORNIA

IBLA 84-824 Decidied June 3, 1987

Appeal from a decision of the Colorado State Office, Bureau of Land Management, dismissing a patent application in part, with prejudice, for certain oil shale placer mining claims. C-38402.

Affirmed.

1. Mining Claims: Contests -- Mining Claims: Patent -- Notice: Generally -- Rules of Practice: Government Contests

   BLM may properly dismiss, with prejudice, a patent application with respect to association oil shale placer mining claims where such claims were properly declared null and void in earlier Government contest proceedings when the applicant's predecessors-in-interest failed to timely file answers to successive complaints, which together resulted in service by registered mail upon all of the co-owners of the claims. It was not necessary that the interests of all of the contestees be declared null and void in a single proceeding.

2. Mining Claims: Contests -- Notice: Generally -- Rules of Practice: Government Contests

   The owner of an oil shale placer mining claim will be regarded as having been properly served with notice of a Government contest complaint when that person actually received a copy of the complaint challenging the validity of the claim, even there was a minor error in the name of the contestee on the complaint and a copy of the complaint was not sent to the post office nearest the claim, in accordance with the applicable rules, paragraph 6 of Circular No. 460, 44 L.D. 573 (1916).

3. Mining Claims: Contests -- Notice: Generally -- Rules of Practice: Government Contests

   Assuming the applicability of rule 8 of the Rules of Practice (51 L.D. 549 (1926)) to Government contests, such a contest challenging the validity of an oil shale placer mining claim will not be held to have abated

> pursuant to that rule where the Government failed to serve one of the co-owners of the claim named in the contest complaint. At best, the contest will be deemed to have abated only as to the unserved contestee.

APPEARANCES: James M. King, Esq., Don H. Sherwood, Esq., Catherine J. Boggs, Esq., Denver, Colorado, for appellant; Marla E. Mansfield, Esq., Lowell L. Madsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Union Oil Company of California has appealed from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated June 20, 1984, dismissing with prejudice that part of its patent application, C-38402, relating to the French Nos. 13 through 16 oil shale placer mining claims, CMC 106252 through CMC 106255. The basis for BLM's decision was that those claims had previously been declared null and void in Government contest No. 12020.

On April 5, 1918, P. C. Thurmond and seven other individuals located the French Nos. 13 through 16 placer mining claims, which are situated in sec. 18, T. 5 S., R. 96 W., sixth principal meridian, Garfield County, Colorado. 1/ By deeds dated July 1 and November 20, 1918, the other locators of the mining claims conveyed their interests to P. C. Thurmond and Coral Thurmond. By deed dated November 29, 1920, P. C. Thurmond, for himself and as the administrator of the estate of Coral Thurmond, conveyed the claims to George Sibbald. On May 4, 1929, George Sibbald died intestate leaving as his heirs, his widow, Edna L. Sibbald, and his son and daughter, George E. Sibbald, Jr., and Gladys Sibbald Quinn. Subsequently, appellant acquired a deed from Edna L. Sibbald conveying her undivided one-half interest in the claims to appellant and a deed from Gladys Sibbald Quinn for herself and as the sole heir of George E. Sibbald, Jr., conveying the other undivided one-half interest in the claims to appellant. By decree dated September 29, 1954, the district court for the County of Garfield and the State of Colorado, in Civ. No. 4541, concluded that appellant was the "record owner" of the four mining claims.

On May 27, 1929, the General Land Office (GLO) issued Government contest complaint No. 12020 challenging the validity of, inter alia, the French Nos. 13 through 16 placer mining claims on the grounds that no assessment work had been performed for the year ending July 1, 1928, that the Juhans were "dummy locators," and that the claims were fraudulent association placer mining claims. The complaint named as contestees, J. S. McCarthy, D. D. Potter and Joseph Bellis. None of those individuals, however, had any interest in the claims. On April 25, 1930, GLO issued another contest com-

1/ By agreement dated Mar. 30, 1918, P. C. Thurmond had agreed "to Locate and survey for the said George Sibbald the following oil-shale claims, [including the] * * * French Groupe." The other locators of the French Nos. 13 through 16 claims were Coral Thurmond, W. S. Parkison, C. W. Taylor, F. N. Juhan, Elizabeth Juhan, James E. Ford, and M. M. Ford.

plaint also designated No. 12020 against those named in the original complaint, and, in addition, P. C. Thurmond, administrator of the estate of Coral Thurmond; H. S. Greene, administrator of the estate of George Sibbald; and J. D. Freeman. The record indicates that all the parties were properly served, by registered mail, return receipt requested, with a copy of the complaint. By letter dated July 1, 1930, the Commissioner, GLO, informed the Register that the claims were declared null and void, in the absence of an answer to the complaint by any of the parties named. 2/

However, by letter dated January 29, 1931, Oral J. Berry, a GLO mining engineer, informed the Register that the heirs of George Sibbald had not been served with a copy of contest No. 12020. In a separate letter approved by the Chief of Field Division, GLO, on January 28, 1931, Berry recommended to the Commissioner, GLO, that the contest complaint be served on the heirs of George Sibbald because "service on the administrator is not sufficient."

Thereafter, on January 30, 1931, the Acting Register issued another contest complaint No. 12020. It included the notation: "Notice to heirs of George Sibbald and Coral Thurmond, Deceased." It did not identify the heirs by name. Nevertheless, appellant admits that post office return receipts "bearing signatures of Edna L. Sibbald, (February 4, 1931), Geo. E. Sibbald (February 7, 1931), and Gladys S. Quinn (February 9, 1931) are contained in the file." (Statement of Reasons (SOR) at 5.)

Subsequently, by letter dated April 13, 1931, the Commissioner, GLO, informed the Register that GLO was in receipt of a supplemental report (apparently the Berry letter, approved January 28, 1931) and that certain other individuals should also receive notice of the charges in contest No. 12020. Among the individuals listed for service by the Commissioner were Edna S. Sibbald, George E. Sibbald, Gladys S. Quinn.

The Commissioner further stated:

> As charge No. 1, relative to assessment work, as stated in said office letter 'N' of May 16, 1929, is defective, in view of the Krushnic decision [Wilbur v. United States ex rel. Krushnic] (280 U.S. 306 [1930]), as it does not allege non-resumption of work, said charge is amended to read:
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> > "That annual assessment work to the value of $ 100 was not performed upon each or any one of the French Nos. 13 to 24, inclusive, oil shale placers, for the year ending July 1, 1929, and that work had not been resumed on June 9, 1930 when notices challenging the validity of the claims were posted thereon on behalf of the United States."

2/ Previously, by letter dated June 4, 1930, the Commissioner, GLO, had informed the Register that based upon a failure to answer the May 29, 1929, complaint, the claims were declared null and void.

Thereafter, on April 18, 1931, the Acting Register issued amended contest complaint No. 12020, including the new charge No. 1, to the named heirs of George Sibbald as named by the Commissioner. The record indicates that copies of the complaint were received by Edna L. Sibbald (Apr. 21, 1931), and George E. Sibbald (Apr. 24, 1931). The copy of the complaint sent to Gladys S. Quinn by registered mail was returned unclaimed. 3/ By letter dated October 26, 1931, the Acting Commissioner, GLO, informed the Register that the claims were declared null and void "to the extent of the interests of the parties served," in the absence of an answer to the complaint.

On May 10, 1932, GLO issued another contest complaint No. 12020 in part against Gladys S. Quinn. The record indicates that a copy of that complaint was received by her on May 14, 1932. By letter dated October 5, 1932, the Commissioner, GLO, informed the Register that the claims were declared null and void "in their entirety," in the absence of an answer to the complaint. Thus, from May 27, 1929, to May 10, 1932, GLO issued 5 separate contest complaints, all designated No. 12020 and all directed to, inter alia, the French claims Nos. 13-16. Each complaint either added or subtracted named contestees and the fourth and fifth complaints included an amended charge No. 1.

On October 26, 1983, appellant filed a patent application with respect to 14 oil shale placer mining claims, including the French Nos. 13 through 16 claims. In its June 1984 decision, BLM dismissed appellant's application in part with respect to these four French claims because the claims "were declared null and void over 50 years ago" such that the interest of appellant's predecessors-in-interest in the claims had "reverted to the United States." BLM dismissed appellant's patent application with prejudice as to these four claims.

In its statement of reasons for appeal, appellant contends that the various contest complaints filed between May 1929 and May 1932 did not properly form the basis for a declaration of nullity because they were procedurally defective. It argues that GLO was without jurisdiction to render a decision in the prior contests because of its failure to join all of the co-owners of the mining claims, at the time of the filing of the contest complaints, i.e., Edna L. Sibbald, George E. Sibbald, Jr., and Gladys S. Quinn, "in a single proceeding" (SOR at 7). 4/ All of the co-owners were indispensable parties to a contest challenging the claims on the basis of nonperformance of assessment work or fraud, appellant asserts, since any one of those individuals could present evidence disputing the Government's charges. Appellant argues that, in the case of each contest complaint, the failure to join one of the co-owners renders the resulting declaration of nullity of no effect, citing United States v. Energy Resources Technology

3/ The copy of the complaint was mailed to Ms. Quinn's address in Long Beach, California, which was the same address at which she had received the January 1931 notice.

4/ Appellant also notes that GLO failed to ever join Edna L. Sibbald since none of the contest complaints gave her proper middle initial, which appellant asserts is a "material part of her name" (SOR at 12).

Land, Inc. (Energy Resources), 74 IBLA 117 (1983). Appellant contends that in each case GLO "improperly attempted to invalidate property rights of persons not before it" (SOR at 16).

Appellant argues further that GLO failed to abide by its own rules with respect to the service of contest complaints, i.e., Circular No. 460 (44 L.D. 572 (1916)), and, thus, GLO failed to satisfy "constitutional requirements of due process," citing, inter alia, Amy v. Watertown, 130 U.S. 301 (1889) (SOR at 20). Appellant states that GLO in particular failed to comply with paragraph 6 of Circular No. 460, which required that service by registered mail be effected by mailing registered letters "to the last address of the party to be notified, as shown by the record, and to the post office nearest to the land." 44 L.D. at 573 (emphasis added). Appellant notes that GLO was required to comply with paragraph 6 of Circular No. 460, including the requirement to also mail a registered letter to the post office nearest to the land, expressly taking exception to the conclusion in Union Oil Company of California (Supp.) (Union Oil (Supp.)), 72 I.D. 313 (1965), overruled and rescinded in part, United States v. Energy Resources Technology Land, Inc., supra, that such mailing was only required in cases of service by publication. In no case appellant states, did GLO mail a registered copy of the contest complaint to the post office nearest to the land embraced in the mining claims involved herein. It concludes that each of the declarations of nullity is, likewise, void for this reason (SOR at 29).

Appellant also argues that each of the contest proceedings abated pursuant to rule 8 of the Rules of Practice (51 L.D. 547, 549 (1926)), in the absence of personal service on all of the co-owners of the claims within 30 days after the contest commenced, citing Johnson v. Udall, 292 F. Supp. 738 (C.D. Cal. 1968). Appellant contends that GLO attempted to avoid rule 8 by treating each contest complaint as amending the original complaint by adding interested parties, and that this was rejected by the court in Johnson as circumventing the clear language of a comparable "abatement" regulation. The basic purpose of the abatement rule, appellant asserts, was "to afford due process by providing for the validity of the Claims to be determined in one proceeding and upon one contest complaint" (SOR at 33). It concludes that, where each contest proceeding abated, the resulting declarations of nullity were void when rendered. Id. at 34.

In response to appellant's statement of reasons, BLM contends that GLO had jurisdiction to declare the mining claims null and void where all of the co-owners were actually served with a copy of the contest complaint, and that, therefore, each party had an opportunity to submit evidence refuting the Government's charges. BLM also argues that GLO was not required to join all the co-owners in one proceeding either because they were necessary, but not indispensable, parties, citing Union Oil (Supp.), supra, or because the later service of an absent claimant "should be viewed as relating back" (Response at 15). BLM distinguishes the case of Energy Resources, supra, on the basis that it involved the absence of any service on certain claimants.

BLM contends that the substantive requirements of due process were satisfied, and contest No. 12020 was not void because of hypertechnical deficiencies, e.g., failure to mail a registered letter to the post office nearest to the land. BLM recognizes that Circular No. 460 did require such

service, but argues that it was not a method likely to result in notice to the claimant where the post office was "often a place quite distant from the party's residence" and that, in any case, any defect was cured by actual service (Response at 22). BLM also reiterates the conclusion in Union Oil (Supp.) that such service need only be effected in cases of service by publication.

The various contest proceedings did not abate under rule 8 of the Rules of Practice, BLM argues, because such rules did not apply to Government contests but only to private contests where the purpose was not to determine the validity of claims but the interest of one party vis-a-vis another. BLM distinguishes the Johnson case on the basis that it involved different facts and different rules, expressly applicable to Government contests. BLM concludes that appellant should not be allowed to reopen decisions acquiesced in by appellant's predecessors in interest.

In a reply to BLM's response, 5/ appellant reiterates its assertion that all of the co-owners of the claims were indispensable parties in a contest challenging the validity of the claims where each had an undivided interest in the claims. Appellant contends that, even given the absence of other procedural deficiencies, the contest proceedings involved herein were fatally defective because Edna L. Sibbald, one of the claimants, was never properly named in a contest complaint such that, although she was served, she was never properly notified that her interest in the claims was being challenged. Appellant also renews its contention that the abatement provisions of the Rules of Practice are applicable to Government contests, as incorporated in Circular No. 460, under the Department's holding in Union Oil (Supp.).

On November 19, 1985, the Board issued an order requesting the parties to brief the effect of the decision rendered by Judge Finesilver of the United States District Court for the District of Colorado, styled Tosco Corp. v. Hodel, 611 F. Supp. 1130 (D.C. Colo. 1985), appeals filed Nos. 85-1968 and 85-2205 (10th Cir. June 29, 1985), on the issues in this case. Appellant responded that the Tosco decision squarely supports appellant on the issues of failing to serve all parties properly and failing to serve all indispensible parties, citing Tosco at 1144. BLM argues that those issues need not have been addressed by Judge Finesilver and that his treatment of them was cursory and conclusory. BLM contends his rulings are not binding on the Board.

Subsequently, the Department of the Interior engaged in settlement negotiations with the parties involved in Tosco and certain other pending lawsuits. By agreement dated August 4, 1986, Tosco and the other cases were settled resulting in the issuance of numerous patents for pre-1920 oil shale

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5/ The Solicitor objects to this reply brief as either not sanctioned by Departmental regulations or untimely under those regulations. However, 43 CFR 4.414 expressly recognizes that an appellant may submit "additional reasons, written arguments, or briefs" and no time limit is set for their submission. We have considered the reply brief. See Southwest Resources Council, Inc., 73 IBLA 39, 41 n.1 (1983); In Re Lick Gulch Timber Sale, 72 IBLA 261, 273 n.6 (1983).

claims. On February 19, 1987, the Board issued an order requesting briefs on the effect, if any, of the settlement and any subsequent events on this appeal.

Both parties responded that as part of the settlement agreement the claimants and the Department agreed jointly to file a motion with the United States Court of Appeals for the Tenth Circuit seeking an order dismissing the appeals of the Tosco case, vacating as moot the judgments appealed from, and remanding the cases to Judge Finesilver with instructions to dismiss as moot the civil actions which gave rise to the appeals. The parties stated that no action had been taken by the court on that motion. However, they also assert that the Board is not precluded from acting on the present appeal regardless of the action on the motion. The parties adhere to their positions, as previously set forth.

To the extent the District Court in Tosco addressed issues similar to those raised in this case, the absence of a detailed analysis or reasoned explanation for its conclusions weighs against acceptance of those holdings. Even if the Court of Appeals for the Tenth Circuit were not to act favorably on the motion regarding the disposition in Tosco, the Board would not be bound by the District Court's rulings. As we have stated on occasion, the Board may decline to follow a district court ruling where a reasonable prospect exists that other Federal courts might reach a contrary result. Oregon Portland Cement Co. (On Judicial Remand), 84 IBLA 186 (1984); see Spring Creek Coal Co., 94 IBLA 333, 334 (1986); Gretchen Capital, Ltd., 37 IBLA 392, 395 (1978). We decline to follow Tosco in this case for the reasons that follow.

Appellant is correct in its contention that all of the co-owners of the unpatented mining claims in question were indispensable parties to the earlier contest proceedings. In Energy Resources, 74 IBLA at 130-31, we expressly overruled a holding enunciated in Union Oil (Supp.) that all co-owners of unpatented mining claims were not indispensable parties with respect to a contest on the basis of a charge of nonperformance of annual labor. In Union Oil (Supp.), the Solicitor concluded that the interest of each claimant was severable and that, therefore, a declaration of invalidity with respect to the interest of that claimant would not adversely affect the interests of the other claimants who were not included in the contest. We rejected this reasoning in Energy Resources, concluding that the "failure to join any co-owner who might have presented evidence of compliance with 30 U.S.C. § 28 was prejudicial to the interests of all." Id. at 131. In this case, contest No. 12020 was based on a charge of failure to perform assessment work, as well as allegations of the use of "dummy locators" and fraud. The Energy Resources case is applicable. The heirs of George Sibbald were indispensable parties to contest No. 12020.

[1] Appellant challenges the propriety of each of the contest proceedings on procedural grounds, i.e., failure to effect service upon the three claimants. It is undisputed that where a party to a mining claim contest does not answer the contest complaint denying the charges therein, which would result in a declaration of invalidity, the Government may properly treat this failure as an admission and declare the claim null and void. Sainberg v. Morton, 363 F. Supp. 1259, 1263 (D. Ariz. 1973); United States v.

Evalt, 62 IBLA 116 (1982); United States v. Honeycutt, 15 IBLA 184 (1974). However, appellant charges that all of the co-owners, Edna L. Sibbald, George E. Sibbald, Jr., and Gladys S. Quinn, had to have been served in a single proceeding and that such service did not take place. Appellant cites the following statement in Energy Resources in support of its position: "[W]here there was an acknowledged failure to serve such indispensable co-owners with notice, the resultant decisions must be regarded as nullities * * *." 74 IBLA at 131. Appellant states that despite five separate attempts between 1929 and 1932, "the Department never properly named and served all co-owners of the Claims at issue here in one distinct action." (SOR at 9).

We will review the history of the issuance and service of the various complaints. The May 1929 and April 1930 contest complaints were inadequate notice because they did not name the then current owners of the claims; i.e., Edna L. Sibbald, George E. Sibbald, Jr., and Gladys S. Quinn. 6/ The January 1931 contest complaint 7/ named as contestees the "heirs of George Sibbald" without specifically naming them. Nevertheless, the complaint was served on each of the three co-owners by registered mail. 8/ The first charge in the complaint, with respect to the nonperformance of assessment work, was amended and included in the April 1931 contest complaint, which was served on Edna L. Sibbald and George E. Sibbald, Jr., as evidenced by return receipt cards. The copy of the complaint sent to Gladys S. Quinn was returned unclaimed. Under the rules applicable to Government contests at that time, specifically rule 6 of Circular No. 460, "[p]roof of service of notice by registered letter shall consist of the report of the register and receiver who mailed the notices [to the last address of the party to be notified * * * and to the post office nearest to the land], accompanied by the post office registry return receipts, or the returned unclaimed registered letters." (Emphasis added). 44 L.D. at 573. Thus, the returned unclaimed registered letter sent to the last address of Ms. Quinn was arguably sufficient under that rule as proof of service. Nevertheless, service of the May 1932 contest complaint was specifically made on Ms. Quinn, as evidenced by a signed return receipt card, and the October 1932 declaration of nullity was based thereon. Thus, we conclude that all three were properly served with the January 1931 comp-

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6/ We note that the April 1930 contest complaint named H. S. Greene, administrator of the estate of George Sibbald. The administrator clearly was in a fiduciary relationship with respect to the estate, which included the claims involved herein. However, the real parties in interest were the heirs of George Sibbald and the April 1930 contest complaint was not served on them.

7/ The record contains only a carbon copy of the typed portion of the complaint. However, it is apparent that this information was originally typed on the complaint form (4-018a). This is likewise true of the May 1932 contest complaint.

8/ Appellant argues that the complaint was defective because it did not individually name the claimants, in accordance with paragraph 4 of Circular No. 460 ("notice * * * must state * * * name of entryman or claimant or other known parties in interest"). 44 L.D. at 573. Such a defect was a harmless error where the claimants could easily determine that they were within the named class, and appellant admits that the three co-owners were actually served with a copy of this complaint.

plaint, that Edna L. Sibbald and George E. Sibbald, Jr., were properly served with the April 1931 complaint, that Gladys S. Quinn was arguably served with that complaint, but that, nevertheless, she was properly served with the May 1932 complaint. Each complaint resulted in a declaration of nullity. Each co-owner received actual notice of the charges and had the opportunity to come forward to rebut them. None did so.

[2] Appellant argues, however, that the January and April 1931 contest complaints were inadequate notice to Edna L. Sibbald of the charges against the claims involved herein because she was not properly named in the complaints. Even though the January 1931 complaint referred only to the heirs of George Sibbald, it is undisputed that Edna L. Sibbald received a copy of the complaint. In the April 1931 complaint, GLO erroneously referred to Edna S. Sibbald. 9/ Appellant asserts that although Ms. Sibbald was served with a copy of the complaint she was not under a duty to respond because she was not properly named on the face of the complaint. Appellant contends that

> [i]f there was actual evidence in the record that Edna L. Sibbald was the heir of George Sibbald and that she was also the person who received the notice and knew, despite the naming of Edna S. Sibbald as the contestee that she was the intended party, the result might be different. [Emphasis in original.]

(Reply Brief at 14).

There is no question that Edna L. Sibbald was the heir of George Sibbald. In fact, appellant itself makes that contention (SOR at 12). Moreover, there is evidence of receipt of two contest complaints by Edna L. Sibbald. Also, in Union Oil (Supp.), 72 I.D. at 315, the Solicitor concluded that proof of service in a mining claim contest will be sufficient unless the signature on a return receipt card is "clearly different and inconsistent with the name of the claimant." The Solicitor stated with respect to a comparable misnomer:

> The appellant argues that the decision was without effect as to Selma Rausch in any event because the complaint was addressed to Selina Rausch. However, as Selma Rausch did receive a registered letter containing notice of contest No. 11925, which notice advised her of the claims to be contested, the charges asserted by the General Land Office, and the effect of a failure to respond, the misnomer did not render the service of notice fatally defective. See Uppendahl v. White, 7 L.D. 60 (1888); Cole v. Ralph, 252 U.S. 286 (1920); Van Buren v. Posteraro, 45 Colo. 588, 102 Pac. 1067 (1909). [Emphasis in original.]

9/ Appellant notes that in January 1931 Berry recommended to the Register and the Commissioner in separate letters that service be made on the heirs of George Sibbald, including Edna E. Sibbald, located at a named address. Despite the erroneous reference to Ms. Sibbald's middle initial in these internal letters and in the April 1931 complaint, actual service was effected.

Id. at 328. See also Hilton v. Koepcke, 19 L.D. 220, 221 (1894). Similarly, in the present case, the discrepancy between the name of the claimant on the April 1931 complaint and her signature on the return receipt card does not render the service fatally defective where the January 1931 and April 1931 complaints, which she received, challenged the validity of claims in which she had a definite interest. Edna Sibbald was clearly on notice as to the effect of her failure to respond to the complaints, and, thus, her duty to respond. As the Supreme Court said in Grannis v. Ordean, 234 U.S. 385, 395 (1914), which involved a defendant (Albert Geilfuss) in a partition suit who was misnamed Albert Guilfuss in the complaint and summons mailed to and received by him, due process "does not impose an unattainable standard of accuracy." The Court continued:

> [W]e think the presumption is clear and strong that the letters would reach -- indeed, that they did reach -- the true Albert B. Geilfuss in Milwaukee. * * * That Geilfuss himself, upon receiving the notice, would be sufficiently warned that it affected his interest in the Minnesota lands under his judgments against McKinley, is free from doubt. He would of course observe the misnomer; but, having received the notice which it was the purpose of the law to convey to him, he could not safely ignore it on the ground of the mistake in the name * * *.

Id. at 398.

Appellant further argues that GLO failed to abide by paragraph 6 of Circular No. 460 in serving the contest complaints because a copy was not sent by registered mail to the post office nearest to the land involved herein. There is no evidence in the record that GLO mailed a copy of the complaints to the nearest post office. Paragraph 6 of Circular No. 460 provides, in relevant part, that:

> Notice of the charges may in all cases be served personally upon the proper party by any officer or person or by registered letter mailed to the last address of the party to be notified, as shown by the record, and to the post office nearest to the land. * * * Proof of service of notice by registered letter shall consist of the report of the register and receiver who mailed the notices, accompanied by the post-office registry return receipts, or the returned unclaimed registered letters. [Emphasis added.]

44 L.D. at 573. Circular No. 460 applied by its terms to "proceedings in contests initiated upon a report by a representative of the General Land Office." Id. at 572. However, the circular also provided that such proceedings "will be governed by the rules of practice." Id. at 574. Those rules were approved December 9, 1910, 39 L.D. 395 (1910) and, as amended, are set forth at 51 L.D. 547 (1926). In Union Oil (Supp.), 72 I.D. at 318, the Solicitor concluded that Circular No. 460 must be construed in a manner consistent with the rules of practice, specifically rule 10, referring to serving notice by publication, 10/ such that "mailing a copy of the notice

10/ Rule 10 specifically required publishing notice of contest in a local

to the post office nearest the land is only required where the Land Office sought to obtain service by publication." 11/ We cited that conclusion with approval in Energy Resources, 74 IBLA at 130. Moreover, we further agree with the statement of the Solicitor in Union Oil (Supp.), at 318-19:

> In any event, such a technical defect, if it be one, did not render the contest proceedings invalid. See Olin Industries, Inc. v. National Labor Relations Board, 192 F.2d 799 (5th Cir. 1951), cert. denied, 343 U.S. 919 (1952); Village of Sebring v. Smith, 123 Ohio 547, 176 N.E. 221 (1931); Entre Nous Club v. Toronto, 4 Utah 2d 98, 287 P.2d 670 (1955); 2 Am. Jr., Administrative Law, Sec. 350, Cf., Restatement, Judgments, Sec. 6. The Rules of Practice (Rule 12, 51 L.D. at 550) specifically provided that:
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> > No contest proceedings shall abate because of any defect in the manner of service of notice in any case where copy of the notice or affidavit of contest is shown to have been received by the person to be served; * * * [12/]

In the present case, there is clear evidence in the form of signed return receipt cards that all three received copies of the January 1931 complaint that George E. Sibbald, Jr., and Edna L. Sibbald received copies of the April 1931 complaint and that Gladys S. Quinn received a copy of the May 1932 complaint. In view of actual service upon the contestees, we must conclude that due process was satisfied. See Grannis v. Ordean, supra; United States v. Gray, 50 IBLA 209 (1980).

[3] The next contention raised by appellant is that each of the contest proceedings must be held to have abated under rule 8 of the Rules of Practice (51 L.D. at 549) where "notice" of the contest was not personally served,

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fn. 10 (continued)
newspaper, sending a copy of the notice by registered mail to the last address of record of the party sought to be served by publication and also to the post office nearest the land. 51 L.D. at 549-50. This procedure was in contrast to "[p]ersonal service of notice of contest * * * by any person over the age of 18 years, or by registered mail," set forth in rule 7. Id. at 548.

11/ The Board in Energy Resources noted this conclusion in Union Oil (Supp.) but did not specifically address it, holding that service was inadequate in that case on the basis of a failure to serve indispensable parties by any means.

12/ Appellant notes that the court in United States v. Eaton Shale Co., 433 F. Supp. 1256, 1262 (D. Colo. 1977), held that proper service was not effectuated in the absence of mailing a registered copy of the complaint to the post office nearest the land, in accordance with Circular No. 460. However, the court also noted that "[t]here is no evidence that copies of the Notice of Charges were received by officers of [the claimant]." Id. Therefore, Eaton Shale involved a failure to serve by any method. Clearly, the implication is that actual service would have sufficed.

including service by registered mail, "within 30 days after issuance of such notice and proof thereof made not later than 30 days after such service." BLM counters by arguing that Rule 8 of the Rules of Practice was not applicable to a Government contest.

The purpose of Rule 8 was peculiar to private contests. As stated in Schmidt v. McCurdy, 44 L.D. 586 (1916): "The purpose of this rule [Rule 8] is to expedite the orderly administration of the public land laws relating to the initiation of contests, and to prevent delaying the prosecution thereof to the detriment of a junior contestant." (Emphasis added). The rule was intended to speed the contest process and failure by the contestee to serve and provide timely proof of service resulted in abatement of the contest. This was fair and allowed a "junior contestant" to step in and bring another private contest. On the other hand, no such compelling interest required service of a Government contest within a specified time nor the making of proof of service. However, paragraph 14 of Circular No. 460 stated that Government contests were to be governed by the "rules of practice." In addition, we are aware of the following statement of the Solicitor in Union Oil (Supp.), 72 I.D. at 321: "Although none of the reported cases cited above involved contests initiated by the Land Office pursuant to Circular No. 460, each of these cases arose under the same general Rules of Practice (51 L.D. 547) which were applicable to the contest proceedings in the cases involved in this appeal."

Regardless of that statement, the conduct of the GLO, as evidenced by the facts regarding service of contest complaints, as set forth in Union Oil (Supp.), 72 I.D. at 331, 332, and 341, indicates that it did not apply Rule 8 to Government contests. The results in the Union Oil (Supp.) case also show that the rule was not enforced. 72 I.D. at 346-47. 13/

We find it unnecessary, however, to decide whether Rule 8 properly applied to Government contests, because if it did, its application does not help appellants since there was compliance therewith. The record indicates that each of the claimants received copies of the January 1931 notice within 30 days of its issuance. Moreover, each of the claimants also received copies of either the April 1931 or May 1932 contest complaints by registered mail, within 30 days of the issuance of such notices, and the record contains the signed return receipt cards. Therefore, we conclude that the contest proceedings cannot be held to have abated.

13/ The Department did state as follows in Jacob A. Harris, 42 L.D. 611, 614 (1913): "The Rules of Practice, relative to the abatement of private contests not diligently prosecuted, will be applied to all proceedings against entries, whether on the part of the Government or of a private individual." That case apparently provided the impetus for the issuance of Circular No. 460. As stated in Harris at 614: "The Commissioner of the General Land Office is directed to prepare and submit to the Department for its approval, regulations in harmony herewith, applicable to all proceedings by the Government against entries."

Appellant's contention of lack of compliance with Rule 8 is based on its assertion that "service was not obtained on all contestees within 30 days after the contest commenced," whether the contest is viewed as a single contest or five separate contests (SOR at 30). Applying Rule 8, GLO had 30 days following issuance of each notice to personally serve the named contestees. See Keller v. Atkins, 41 L.D. 511, 512 (1913). This was accomplished with respect to the January 1931 notice. Although the April 1931 complaint named Gladys S. Quinn and she did not sign for the complaint within 30 days of issuance of that complaint, at best that proceeding only abated as to her interest and did not affect GLO's ability to declare the interests of the other claimants null and void in that proceeding. See Starks v. Mackey, 60 I.D. 309, 313 (1949); Proceedings Against Oil Shale Locations in Colorado-Notice, 53 I.D. 562 (1931).

Appellant argues that a contrary result is dictated by the case of Johnson v. Udall, supra. The Johnson case, however, is based on an interpretation of 1966 regulations governing the issuance of contest complaints, not Rule 8 which appellant asserts is controlling in this case. The regulation applied in Johnson, 43 CFR 1852.1-5(a) (1966), provided that if the contest complaint failed to name an interested party, as required by 43 CFR 1852.1-4(a)(1) (1966), or was not served on each contestee, the contest complaint would be dismissed. In Johnson eight individuals filed a mineral patent application. Subsequently, the Government issued a contest complaint and served it on the attorney whose address was given in the patent application. Between the time of the filing of the patent application and the issuance of the complaint, one of the patent applicants had died. This fact was unknown to the Government and to the attorney at the time of issuance of the contest complaint. A timely answer was not filed, and the Department rejected the mineral patent application. On appeal, the Assistant Solicitor ruled that the contest complaint was properly served as to the living contestees, but not as to the deceased contestee, and therefore, the contest complaint was properly taken as admitted only as to the seven contestees who were properly served. The Johnson court ruled that in such a circumstance Departmental regulations required the dismissal of the contest complaint as to all contestees. 292 F. Supp. at 749.

Rule 8, on the other hand, did not provide for abatement of the contest where the contest complaint failed to name an interested party or where each contestee was not served. Rule 8 merely stated that the contest would abate where the notice of contest was not personally served or publication commenced within the time limits set forth in the rule. 51 L.D. at 249. For that reason, the Johnson case is distinguishable. 14/

14/ Current Departmental regulations provide at 43 CFR 4.451-2(b) that a Government contest complaint "will not be insufficient and subject to dismissal for failure to name all parties interested, or for failure to serve every party who has been named." This regulation was originally promulgated at 43 CFR 1852.2-2(b) (35 FR 17997 (Nov. 24, 1970)), principally in response to the result reached by the Johnson court.

Moreover, in Johnson the contestees diligently sought to pursue their rights by filing an answer, albeit late, and seeking review of each adverse determination. In this case appellant's predecessors in interest received notice. They filed no answers. Nor did they raise any objection to service of the complaints. Appellant cannot at this late date resuscitate these claims by asserting technical arguments relating to service of the complaints when the record shows each of the interested parties received actual notice and made no objections to the charges. See Gabbs Exploration Co. v. Udall, 315 F.2d 37, 40 (D.C. Cir.), cert. denied 375 U.S. 822 (1963).

Appellant has filed a "Motion for Remand or Referral" in this case. Therein, it requests that the Board remand the case to BLM and direct that BLM address all issues which would present an obstacle to patenting the claims in issue. In the alternative, appellant moves the Board to refer the case to an administrative law judge for hearing and a decision on the disputed factual issues.

Given our resolution of this case, which is adverse to appellant, we deny its request to remand the case to BLM. We are aware of appellant's assertion that it will seek judicial review of the isolated issue presented in this case and that a piecemeal approach to oil shale claim adjudication in some circumstances has been frowned upon by the courts. However, the question presented in this case is a threshold one and our ruling is dispositive of appellant's patent application as to these claims. Only a final adverse ruling on judicial review should require the further expenditure of time and resources for adjudication of the patent application as to these claims. Likewise, there is no need to refer this case to an administrative law judge. Although the Board has the authority, pursuant to 43 CFR 4.415, to order a hearing where there is an "issue of fact," there is no issue of material fact in the present case. Therefore, we decline to grant a hearing. See Stickelman v. United States, 563 F.2d 413, 417 (9th Cir. 1977); United States v. Consolidated Mining & Smelting Co., 455 F.2d 432, 453 (9th Cir. 1971).

We conclude that BLM properly dismissed appellant's patent application with prejudice with respect to the French Nos. 13 through 16 placer mining claims where the claims had already been adjudicated with administrative finality in earlier contest proceedings. Those earlier proceedings were not procedurally defective where all of the then claimants were served with a copy of the contest complaint and they failed to file any answers. The proceedings effectively declared the claims null and void. There is no evidence that any of the owners of the claims objected at any time to the Department's declarations of nullity with respect to the claims, either by a timely appeal or otherwise. The earlier contest proceedings were determinative of the interests of appellant's predecessors-in-interest, and appellant's patent application as to those claims is properly rejected for that reason. See Gabbs Exploration Co. v. Udall, supra; Pacific Oil Co. v. Udall, 273 F. Supp. 203 (D. Colo. 1967), aff'd, 406 F.2d 452 (10th Cir.), cert. denied, 395 U.S. 978 (1969); cf., Mineral Investigation & Development Co., 71 IBLA 398 (1983).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Kathryn A. Lynn
Administrative Judge
Alternate Member.